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No. 91-308

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DETECTIVE McCOMISKEY and
POLICE OFFICER O'BRIEN,

Petitioners,

vs.

CARLOS SOBA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Petitioners were entitled to qualified immunity notwithstanding the jury's determination that the Petitioners acted unreasonably and "maliciously or wantonly" when the Petitioners used excessive deadly force against Respondent Soba by shooting Soba repeatedly after Soba had (i) attempted to surrender; (ii) already been shot in the stomach by another officer; and (iii) offered no resistance to arrest.

2. Whether the evidence presented at trial, which consisted entirely of conflicting testimony, was such that, without weighing the credibility of the witnesses or considering the weight of the evidence, a reasonable person could have reached only one conclusion, that the Petitioners acted reasonably when they fired upon Soba.

COUNTERSTATEMENT OF THE CASE

The questions presented by the Petitioners are a thinly veiled attempt to convince this Court to overturn the factual determinations of a jury. Judge Patterson[1] recognized in his Opinion of October 17, 1990 denying the Petitioners motion for Judgment N.O.V., "the testimony at trial . . . conflict[ed] particularly on the sequence of events during the shooting." (15a). (Judge Patterson contrasts this conflicting testimony in his Opinion of October 17, 1990 at 15-19a.)[2] Since the evidence presented at trial rested entirely on the conflicting testimony of the parties, the lower courts properly denied Petitioners' request for Judgment N.O.V. *See Basham v. Pennsylvania Railroad Company*, 372 U.S. 699, 700-01 (1965).

Soba does not dispute in large part the statement of facts presented in Petitioners' brief; however, there are a number of crucial omissions, the most important of which is Petitioners' failure to acknowledge the discrepancies between their testimony and the testimony of Soba. These discrepancies can be summarized in four categories as follows:

(i) *Soba attempted to surrender.*

Soba testified that after McGoey fired a shot into his stomach Soba yelled, "Que pasa?, I surrender" (120, 176-80A). In contrast, Sergeant McGoey and Petitioner O'Brien testified that they did not hear Soba say anything (270, 298A).

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[1] "Judge Patterson" refers to the trial judge, the Honorable Robert P. Patterson, Jr.

[2] References to the Petition of Certiorari are abbreviated "Pet." Page references to the Appendix to Petition for A Writ of Certiorari are given in the form "__a" with the page number preceding. Page references to the Joint Appendix in the Court of Appeals are given in the form "__A" with the page number preceding.

(ii) *Soba never pointed the gun at any officer.*

Soba demonstrated to the jury that during the entire shooting he was holding the gun against his chest. This demonstration was described for the record by Judge Patterson as follows:

> The witness held his left hand in a position approximately the height of his shoulder with the elbow tucked into his side and his right hand at his right side, indicating that the gun was held in say a 45 degree angle from the lower chest area up to the shoulder on the left side, lower chest area on the right side of the shoulder area on the left side.

(117A)

In response to Judge Patterson's questioning, Soba indicated that the barrel of the gun was slightly above his left shoulder (117-18A). Soba testified that he continued to hold the gun this way while Sergeant McGoey and the Petitioners fired their shots (120-22, 214A). In contrast, the Petitioners testified that once McGoey finished shooting all six shots in his gun at Soba (309A), Soba "whipped" around and pointed the gun at the Petitioners (303, 307, 343A).

(iii) *When McGoey shot Soba, Soba turned away from the Petitioners.*

Soba testified that after he was first shot in the stomach and the left shoulder, he turned counterclockwise (214-15A). In contrast, the Petitioners each testified that Soba turned toward the officers (303, 307, 343A). However, as was demonstrated to the jury at trial and recognized by Judge Patterson in his October 17, 1990 Opinion, in order for Soba to turn toward the Petitioners he would have had to turn clockwise (21-23a).

Whether Soba turned clockwise or counterclockwise after McGoey's gun shots struck him in the stomach and left shoulder is critical. If Soba turned clockwise as the Petitioners and McGoey testified, Soba would have been turning toward the

Petitioners when they fired. However, if Soba turned counterclockwise then he was turning away from McGoey and the Petitioners when the Petitioners shot.

Recognizing this distinction Judge Patterson wrote in his Opinion of October 17, 1990 as follows:

> The jury would also be entitled to make deductions about the use of excessive force, particularly if it concluded that Soba's back was to McComiskey and O'Brien, that he had been wounded at least three times by McGoey and was no longer a threat to him. The jury had more than ample opportunity to assess Soba's credibility during his lengthy cross-examination. Under these circumstances, the court may not usurp the jury's role of weighing the credibility of witnesses or the weight of evidence presented. *Stubbs v. Dudley*, 849 F.2d 83 (2d Cir. 1988); *cert. den.*, 489 U.S. 1034 (1989).

(19-20a)

(iv) *Petitioners failed to provide a credible explanation for shooting Soba.*

The reasonable police officer is expected to provide an explanation each time he discharges his weapon in the line of duty. The Petitioners' failure to provide a credible explanation for shooting Soba is another factor indicating that they acted unreasonably.[3]

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[3] The Petitioners contend that the "subjective motivations" of the Petitioners were improperly put in issue when Judge Patterson noted that the jury could draw inferences from the Petitioners failure to provide a credible explanation for firing upon Soba. Pet. 30-32. However, this Court has recognized that in order to make the "objective legal reasonableness" determination required in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court will often need to examine the information possessed by the police themselves. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Moreover, it was the Petitioners that put their "subjective motivations" in issue:

(Footnote continued)

Petitioner McComiskey testified that he saw Soba extending the gun toward Sergeant McGoey in what he described as a "firing position" (303A), and that after McGoey fired the six shots in his gun, Soba "did a complete 90-degree turn" and faced McComiskey (303A). McComiskey fired all six shots in his gun, (Id.) testifying that he didn't begin to fire until McGoey "stopped firing" (309A).

Similarly, Petitioner O'Brien testified as follows:

> As I exited the car, Sergeant McGoey discharged his weapon at Soba. At that point Mr. Soba turned in my direction, I yelled for him to drop the gun, and he had – seemed to be bringing it up higher when he turned towards me. I discharged two shots at Mr. Soba, at which point he fell.

(343A)

The picture that the Petitioners painted for the jury was that Soba had the "drop" on Sergeant McGoey (283A), yet did not fire (284A), which caused Sergeant McGoey to fire six shots (283A) at least two of which struck Soba (212-14A) one each

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[Petitioner's Counsel] Q. What were your reasons for firing at Carlos Soba that evening?

[McComiskey] A: Well he was as close as you can get, I felt, to me and when he turned in my direction and I seen that large hole in that very large shotgun, I thought I was dead, and r I was firing my gun I was waiting to see the flash from his gun (305A).

Similarly, Petitioner O'Brien testified on direct examination that he fired because Soba turned toward him and was bringing the gun up to fire (343A). The jury has since rejected the "subjective motivations" offered as evidence by the Petitioners, leaving the Petitioners now to contend that the district court should be faulted for recognizing that the jury could draw negative inferences from the lack of credibility of the Petitioners.

in the stomach (120A) and the shoulder (214-15A). Soba, wounded, then purportedly "whipped" around (307A) and pointed his gun at the Petitioners (303, 307, 343A) which caused the Petitioners to fire a total of eight times (308, 344A). Once again Soba did not fire a shot (354A).

The jury rejected the Petitioners' testimony. The fact that the Petitioners were unable to provide a credible explanation for the shooting is certainly a factor the jury may consider in evaluating the reasonableness of the officers' conduct.[4]

(v) *The evidence supports the jury verdict.*

If the evidence is viewed in the light most favorable to the verdict winner, Soba, it is apparent that there is an evidentiary basis for the jury's determination that the Petitioners acted unreasonably. After McGoey's first shot hit Soba in the stomach, Soba shouted "Que pasa, I surrender" (120, 176-80A). Soba was then hit with a bullet in the shoulder which caused him to turn counterclockwise (214-15A), away from the officers. Soba, wounded and attempting to surrender, continued to hold the gun against his chest while the Petitioners fired eight more shots (120-22, 214A). The Petitioners' explanation for why they shot Soba, that they fired in self defense, was rejected by the jury.

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[4] Judge Patterson found that there was sufficient evidence to allow the jury to reject the Petitioners' testimony and therefore "it was permissible for the jury to infer that their testimony was developed to cover a failure on their part to act properly" (23a). Although this inference was not necessary for the jury to determine that the Petitioners acted unreasonably, it is certainly an inference the jury logically could have drawn from the Petitioners' inability to provide a credible explanation for shooting Soba.

Reasons for Denial of the Writ

I. THE PETITIONERS WERE NOT ENTITLED TO QUALIFIED IMMUNITY

A. *All New York City Police Officers Should Know that the Use of Excessive Deadly Force Is Unconstitutional*

The Petitioners contend that even though the jury found that their shooting of Soba was unreasonable and malicious, they were "entitled to qualified immunity as a matter of law." Pet. at 27. However, this Court has held that a government actor is entitled to qualified immunity only "insofar as his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow*, 457 U.S. at 818, or, where the rights were clearly established, insofar as it was objectively reasonable for the officer to believe that his acts did not violate those statutory or constitutional rights. *Anderson*, 483 U.S. at 640.

The Petitioners fail to meet either standard. "The right of an individual not to be subjected to excessive force has long been clearly established." *Calamia v. City of New York*, 879 F.2d 1025, 1036 (2d Cir. 1989) Thus, the question before the Second Circuit was whether it was "objectively reasonable" for the Petitioners to believe that their treatment of Soba did not violate that right. As this Court stated in *Harlow*:

> If the law was clearly established, the immunity defense should fail, since a reasonably competent public official should know the law governing his conduct.

457 U.S. at 818-19.

This was precisely Judge Patterson's reasoning in denying the Petitioners qualified immunity argument at Summary Judgment:

> All New York City Police Department Officers should know that the use of excessive deadly force is unconstitutional. The question is whether or not the defendants should have known from their positions during the apprehension of [Soba] that the force they were utilizing was excessive.

(41-44A)

The Petitioners apparently recognize this flaw, for they now contend that even if their conduct was excessive under current-day standards set out in *Tennessee v. Garner*, 475 U.S. 1 (1985), their conduct was justified under pre-*Garner* standards. Pet. at 39-42. Although they offered no such evidence at trial, Petitioners now contend that they were relying on N.Y. Penal Law 35.30 or 35.15, the operative provisions at the time of the shooting, and that the shooting was justified since they "had objective reasonable cause to fear serious physical harm from an armed felon." Pet. at 42.[5] The Petitioners' argument fails for two reasons. First, the jury implicitly found that the Petitioners did not have "objective reasonable cause to fear serious physical harm from [Soba]." Second, *Garner* is to be applied retroactively, and thus N.Y. Penal Law 35.30 or 35.15 has limited, if any, relevance. *See Davis v. Little*, 851 F.2d 605, 608-09 (2d Cir. 1988).

The Petitioners also contend that "there is a conflict among the Circuits as to whether qualified immunity is ultimately a legal determination for the Court, or an issue to be submitted to and resolved by the jury." Pet. at 33-34. However, this issue was not determinative in the instant matter. Judge Patterson denied Petitioners qualified immunity defense when he denied their motion for (i) summary judgment (27a), (ii) a stay of trial pending appeal (41-44A), and (iii) Judgment N.O.V., directed verdict or a new trial (10-26a).

Moreover, Judge Patterson recognized that despite Petitioners' repeated attempts to convince the district court to grant qualified

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[5] The Petitioners offered no evidence that they were relying on N.Y. Penal Law 35.30 or 35.15 at trial, contending instead that they shot Soba because he was pointing a gun at them (284, 303, 343A). The jury rejected this argument.

immunity, the Petitioners could later contend that the jury should have made this determination. Therefore, Judge Patterson offered Petitioners the opportunity to fashion a qualified immunity special interrogatory, an opportunity of which Petitioners failed to take advantage (338-39A). Having failed to prepare a special interrogatory requesting whether the jury would have granted qualified immunity, the Petitioners should not be granted certiorari on the speculation that the jury may have granted qualified immunity.[6]

II. THE PETITIONERS WERE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THERE WAS AN EVIDENTIARY BASIS FOR THE JURY'S DETERMINATION THAT THE PETITIONERS ACTED UNREASONABLY

The Petitioners contend that certiorari should be granted because the jury's verdict was against the weight of the evidence and that they were entitled to a Judgment N.O.V. Pet. at 54-55. However, it is the long settled practice of this Court to refuse to grant certiorari to review evidence and discuss specific facts. R. Stern & E. Gressman, *Supreme Court Practice* at 217 (6th ed. 1986); *Graver Tank & Mfg Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this court, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"). Accordingly, the Petitioners' request for this Court to grant certiorari to review the facts of the case should be denied. However, as is demonstrated below, even if this Court did review the facts, such a review would not warrant disturbing the jurys' verdict.

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[6] Even if the Petitioners had fashioned a special interrogatory for the jury, it is highly doubtful that the jury's response would have been favorable to the Petitioners, since the jury not only found that the Petitioners acted unreasonably, but also found that they acted "maliciously or wantonly." (142A)

A. *The Court Must View the Evidence in the Light Most Favorable to Soba*

In reviewing the District Court's denial of a Judgment N.O.V., the appellate court must view "the evidence in the light most favorable to the party against whom the motion was made, and that party must be given the benefit of all reasonable inferences that might have been drawn in his favor from the evidence." *Bohack Corp. v. Iowa Beef Processors, Inc.*, 715 F.2d 703, 712 (2d Cir. 1983); *Stubbs v. Dudley*, 899 F.2d 83 (2d Cir. 1988), *cert. denied*, 484 U.S. 1034 (1989).

Since the evidence presented at trial concerning the reasonableness of the Petitioners' conduct rested entirely on the conflicting testimony of the parties, the District Court correctly denied Petitioners' request for Judgment N.O.V. *See Basham*, 372 U.S. at 700-01.

B. *The Witnesses' Conflicting Testimony Must Be Resolved In Favor of Soba*

At trial the parties presented conflicting testimony on a number of issues crucial to the determination of the reasonableness of the Petitioners' firing upon Soba. The jury weighed the credibility of the witnesses and the plausibility of the testimony and chose to believe Soba. An appellate court cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury. *See Aaron Ferer & Sons, Ltd. v. Chase Manhattan Bank*, 731 F.2d 112 (2d Cir. 1984).

It is not within this Court's authority "to reevaluate the conflicting evidence and mandate a result opposite from that reached by the jury." *Basham*, 372 U.S. at 700; *Atlantic and Gulf Stevedores, Inc. v. Ellerman Cines, Ltd.*, 369 U.S. 355, 359-60 (1962) ("neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them"). This Court's province is to determine if there was an evidentiary basis for the verdict. *Basham*, 372 U.S.

at 700. In making this determination the Court must resolve all issues of credibility in favor of the verdict winner [Soba] and draw all reasonable inferences from the evidence viewed in the light most favorable to the verdict winner. *See Gehrhardt v. General Motors Corp.*, 581 F.2d 710 (2d Cir. 1978).

C. *There Was an Evidentiary Basis for the Jury's Determination that the Petitioners Acted Unreasonably*

Whether the Petitioners utilized excessive force in violation of the Fourth Amendment is determined by an objective reasonableness standard based upon the totality of the circumstances. *Graham v. Connor*, 490 U.S. 386 (1989). The determination of "reasonableness" is a question of fact for the jury. *Powell v. Gardner*, 891 F.2d 1039, 1043-44 (2d Cir. 1989).

The key evidence in this case was the conflicting testimony as to the actual shooting. This evidence, viewed in the light most favorable to the verdict winner (Soba), and giving the verdict winner all reasonable inferences, indicates that after McGoey's first shot hit Soba in the stomach, Soba shouted "Que pasa, I surrender" (120, 176-80A). McGoey then discharged the remaining bullets in his gun. Soba, wounded and attempting to surrender, continued to hold the gun against his chest as the Petitioners fired eight more shots (120-22, 214A). The only explanation offered by Petitioners for firing upon Soba, that they fired in self defense, was rejected by the jury.

CONCLUSION

It is respectfully submitted that Petitioners have failed to sustain their burden of establishing that there are special and important reasons why the Writ of Certiorari should be granted. The decision below does not conflict with any decision of another Circuit, or of this Court. As the decisions of the Second Circuit and the District Court correctly apply principles previously articulated by this Court, it does not involve any important question of federal law which has not been, but should be, settled by this Court. Accordingly, Petitioners have not shown any reason why this Court should exercise its sound judicial discretion to entertain this case.

Dated: New York, New York
September 17, 1991

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